IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1976

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SUPREME COURT, U.S.

DANE LAMAR JENKINS,
Petitioner,

vs.

LOU BREWER, WARDEN,
Respondent.

No. 80-5116

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Dane lamar Jenkins, pro se
Petitioner

INDEX

	Page
Opinion Below	1
Jurisdiction	1
Questions Presented	1
Statutes	2
Argument	4
I. CERTIORARI SHOULD BE GRANTED, WHEN THE EXHAUSTION OF ADMINISTRATIVE REMEDIES HAS, AND WOULD HAVE PROVEN TO BE FUTILE	4
II. CERTIORARI SHOULD BE GRANTED TO INSURE THAT THE DISTRICT COURT WILL NOT DISMISS A COMPLAINT WITHOUT HEARING ALL FOCUSINGS THAT HAVE BEEN PRESENT TO BE RULED UPON	8
Conclusion	11
Certificate of Service	12
Appendix	

Table of Authorities.

Cases:

Houghton v. Shafer, 392 U.S. 639, 88 S.Ct.2119,(1968)	5,6,7
Rickets v. Lightcap,567 F.2d 1226,(1977)	5
Monroe v. Pape, 365 U.S.167, 81 S.Ct. 473 (1961)	5,7
Sigafus v. Brown,416 F.2d 105(1969)	6
DeWitt v. Pail, 366 F.2d 682 (1966)	6
Corby v. Conboy, 457 F.2d 251 (1966)	6
McNeese v. Board of Education,373 U.S. 668, 83 S.Ct. 1433, (1963)	7
Damico v. California,389 U.S. 416, 88 S.Ct. 526,(1967)	7
Wolff v. McDonnell,418 U.S.539, 99 S.Ct. 2963, 41 L.Ed 2d 935,(19__)	8
Lane v. Maryland,320 F. 2d 179,(1963)	8
Wilwording v. Swenson, 404 U.S.249,30 L.Ed.2d 418, 92 S.Ct. 407,(1971)	8
Toman v. Davs, 371 U.S.178,182, 83 S.Ct. 227, 9 L.Ed 222,(1962)	9

Amstrong v. Rushing, 352 F.2d 836 (1965)..... 9

Potter v. McCall, 433 F.2d 1087, (1970)..... 9

Dodd v. Spokane County, 393 F.2d 330 (9th Cir 1969)..... 9

Harmon v. Superior Court, 307 F.2d 796, (1962)..... 9

Shelley v. Kraemer, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 116, (1948)..... 10

Carter v. Carlson, 447 F.2d 358, (1971)..... 11

Asher v. Harrington, 461 F.890,(1972)..... 11

Statutes and Rules Page

Title 42 United States Code. Section 1983..... 2,5

Rule 15(a) Federal Rules of Civil Procedure..... 2,9

Rule 8(a)(2). Federal Rules of Civil Procedure..... 9

Rule 15, Federal Rules of Civil Procedure..... 9

Rule 19,(a), Federal Rules of Civil Procedure..... 10, 11

Title 28 United States Code. 1254 (1)..... 1

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1976

DANE LAMAR JENKINS,
Petitioner,

vs. No._____

LOU BREWER, WARDEN,
Responant.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner Dane Lamar Jenkins, an indigent prisoner, presently confined at Stateville State penitentiary, Will County, Illinois, and a U.S. Citizen, respectfully prays that a Writ of Certiorari issue to review the final judgments of the United States Court of Appeals for the Seventh Circuit entered in this cause on June 20, 1980.

OPINION BELOW

The opinion of the District Court entered by judge Bernard M. Decker, on October 24, 1979, which is setforth in full review in appendix(A) hereto attached. The order of the Court of Appeals for the Seventh Circuit is also attached hereto in appendix (B).

JURISDICTION

The judgment of the Court of Appeals in appendix (B), was entered June 20, 1980. The jurisdiction of this Court is invoked under Title 28, section 1254 (1), United States Code.

QUESTION PRESENTED

I. Whether the District Court errored when granting the Respondant's summary judgment based upon the Petitioner failure to exhaust his Administrative remedies; when such exhaustion attempts would have proven to be futile,as the relief the Petitioner seeked fro m the Administrative Inquiry Board, which amounted to an inadequate remedy.

II. Whether the District Court errored by not granting judgment to the Petitioner; after the Respondant's never denied confiscating Petitioner's legal materials and other valuable items, during the Institutional State of Emergency orded by the Director of Illinois Corrections.

III. Whether the District Court errored by dismissing Petitioner complaint before hearing or ruling on his "Motion for leave to Amend and Supplement his original complaint.

STATUTES

This case involves section 1979, of the Revised Statutes, compiled as 42 U.S.C. 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or territory, subjects, or cause to be subjected, any Citizen of the United States or any person within the jurisdiction thereof to the deprivation of any Rights, privileges, or immunities secured by the constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Rule 15 (a) of the Federal Rules of Civil Procedure which reads as follows, in pertinent part:

> A party may amend his pleading once as a matter of course at any time before a responsive pleading is served .... Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

STATEMENT OF THE CASE

1. On February 24, 1979, Gayle Franzen, Director of the Illinois Department of Corrections, declared Stateville penitentiary as a state of emergency. While Lou Brewer, Warden, acting on the Director's directive, proceeded by issuing orders to lock the Institution down, plus, issued instructions to George May, Administrative Assistant to the Warden, to search and confiscate all contraband materials. In order to carry out the search and seizure directive, Stateville prison officials removed residents from their assigned cells to cells located in other houses for seven days. All property belonging to residents were left behind in their original cells.

A directive from Warden Lou Brewer instructed all residents to place all property that were not required to be kept, in shipping boxes to be mailed home to their families, and all other property left on their beds for inspection.

2. On March 17, 1979, Petitioner was separated from his assigned cell and transfered to another cell house for seven days. It was upon his return to his assigned cell that he found legal materials and other property that he should have been allowed to keep missing. An Administrative grievance was filed with the Institutional Inquiry Board. A few days later, a letter from George May, Administrative Assistant to the Warden of Stateville, confirmed that a hearing would be held, and that his office would attempt to locate and return Petitioner's property.

3. A few days after receiving the official response from George May, who were directly in charge of officiating the shakedown, Petitioner was informed that the property that were confiscated was designed to be shipped to his home; The Petitioner property was consisted of, amongst other things as listed in exhibit (C), law books, two transcripts, a copy of Petitioner's post-conviction petition, plus, numerous motions and legal correspondences. E. Maxwell the official that was direct in charge of shipping residents as well as Petitioner's property home after it was confiscated from his assigned cell.

4. The Institutional Inquiry Board heard Petitioner grievance on April 19, 1979, the Board accepted jurisdiction, heard partial of Petitioner grievance and ruled that it had no substance because the prison officials who conducted the shakedown made no records that would substantiate any residents claims. The Administrative Rules and Regulations clearly setforth the criteria that prison officials are suppose to use when searching residents calls or persons, above all, an officials conducting a search is suppose to leave behind for the resident a copy of "Record Form Dissemination to resident" see exhibit (D). The Board also recommended that Petitioner file with the Court of Claims for redress.

5. A second grievance was filed with the Institutional Inquiry Board addressing amongst other things, the like of a redress in the Court of Claims

for such things as legal documents,law books, and personal correspondence. The Board Ruled that the issue had been heard once, and it declined jurisdiction.

6. On May 29, 1979, Petitioner filed a Civil Rights complaint with the United States District Court, Northern District of Illinois, and on October 24, 1979, Petitioner complaint was dismissed for failure to exhaust Administrative remedies.

7. On November 8, 1979, Petitioner filed a notice of appeal, in the United States Court of Appeals, Seventh Circuit, his appeal was granted and on June 20, 1980, his appeal were dismissed, for reason that the Court adopted the decision of the District Court and affirmed the judgment.

ARGUMENT

I. CERTIORARI SHOULD BE GRANTED, WHEN THE EXHAUSTION OF ADMINISTRATIVE REMEDIES HAS, AND WOULD HAVE PROVEN TO BE FUTILE.

Petitioner filed a grievance with the Administrative Inquiry Board about the concern of his property that was confiscated from his cell and the property that he mailed in the custody of the Respondent. The Board only had a hearing on partial of the Petitioner property, which was the property that was contained in the mail. There was a second grievance filed with the Administrative Inquiry Board, but the Board responsed throught mail informing Petitioner that his grievance had been heard once on the property issue, and he was inform to file with the Court of Claims, see exhibit (E), attached.

Petitioner felt that if he could not receive a properly ruling from the Administrative Inquiry Board in the concern of all his property instead of partial, he contends that redressing his grievance to the Court of Claims for transcripts, a post-conviction petition, numerous motion, law books, legal correspondence, and other personal property Items, would have eventually resulted into a futule act, because the above property mention is not taxable or determine.

So Petitioner contention that a Court and not the prison system was the most appropriate remedy to seek redress of his grievance. But the Courts that he previous redressed his grievance to, failed to realize that the prison Inquiry Board refused to grant him relief on the basis of a lack

of documentation and other property that was confiscated from his cell. Which makes it unlikely that his claims or grievance could have been resolved by further Administrative proceedings within the prison system, although he contends that such Administrative remedies attempts would have been futile to seek relief, especially, when his next step in the appeal process would have been to the Director of Corrections, who he seeks to bring in as a party to this action, see Houghton v. Shafer, 392 U.S. 639(1968).

Petitioner claims that after filing two grievances and both attempts have proved to be useless, Petitioner so feels that there was no other remedy required for him, but the Court to redress his grievance to. Which that Administrative remedy is not required before filing 1983 section 42, see Rickets v. Lightcap, 567 F.2d 1226 (1977). The Petitioner agrees with the decision in Rickets v. Lightcap, case, that a state prisoner is not required to exhaust State Administrative remedies before bringing an action under Civil Rights Statute in Federal Court for deprivation of his constitutional rights. Although in recent years, the Court has had frequent occasion to consider the scope of the remedy created in section (1) of the Civil Rights Act of 1871. Compiled as 42 U.S.C. 1983.

The Courts erred by not ruling on Petitioner legal documents that was mention in his grievance, and confiscated with his other property, which he was deprived of the use and enjoyment of that property when the prison officials cofiscated his transcripts, law books, numerous motion, a post-conviction petition, families pictures, legal and personal correspondence, and other property Items. Such deprivation of Petitioner property was a violation of his Fifth and Fourteenth Amendments Rights. And the Respondent's did not deny the fact that the Respondent's violated Petitioner Constitutional Rights when deprived him of his legal materials and other valuables, during the Stateville State of Emergency orded by the Director of Illinois Corrections, see Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473, (1961).

If the Court meant what it said in the Monroe v. Pape, Supra at 187, then section 1983 has dispensed with "consciousness of wrong-doing, "and negligent conduct under color of State law which as here, results in a deprivation of a State created property

Right, in actionable under section 1983. The Petitioner claims that the deprivation of legal materials necessary to afford reasonable acess to the Courts violates the Due Process Clause of the Fourteenth Amendment and that a Court should have jurisdiction of a claim for damages based on such deprivation, see Sigafus v. Brown, 416 F.2d 165,(1969). In the Sigafus v.Brown decision, it showed that the Courts erred for dismissing Petitioner complaint, and it would have been an futile attempt for him to further exhaust Administrative remedies seeking relief for his legal documents, See Houghton v. Shafer, 392 U.S.639,88 S.Ct.2119 (1968), DeWitt v. Pail,366 F.2d 682,(1966).

It was and error in the Courts behalf not to recognize the Inquiry Board exhibit that were attached to Petitioner complaint,and acknowledge the fact that the Inquiry Board only ruled on partial of his property, and on the other hand the board would not except the responibility of the prison officials confiscating anything but the mail property, which were prevented from being forward out to Petitioner home. Such evidence clearly states facts involving a liberty interest which the Courts have consistently protected. Such infringement upon Petitioner constitutional Rights as setforth in the Bill of Rights and the First Amendment,"that freedom can not be justified under the quise of a legitimate government interest." And the Respondent's did not deny that the prison officials confiscated Petitioner mail, which was consisted of family pictures, cigarettes, a letter to his Mother, legal materials that his Mother were supposed had taken to a counsel. Seeking a return of these items would be futile to resort to the Administrative remedies or appealing to the Director of Corrections for relief.

Unlike the mail that Petitioner had mailed but were never sent out by the Respontent's, Petitioner had a Right for his mail to be sent out, whereas he is aware that the prison officials have a Right to inspect his mail before turning it over to the postage, but not seize the mail from the party that Petitioner had forwarded it to, Corby v. Conboy, 457 F.2d 251 (1972).

Despite the facts of other Courts decisions, Petitioner agrees with the decisions of, McNeese v. Board of Education, 373 U.S. 668,83 S.Ct.1433(1963), Damico v. California, 389 U.S. 416,88 S.Ct.526 (1967), Monroe v. Pape, 365 U.S.167,81 S.Ct. 473 (1961); Houghton v. Shafer, 392 U.S. 639, 88 S.Ct. 2119(1968). In the mention cases which states that the requirement of exhaustion of Administrative remedies has no applicability where those remedies would be inadequate or where their exhaustion would certainly or probably be futile, as here, in this matter.

Petitioner contends that because of the value of his property could adequately be assessed, he was required to exhaust Administrative remedies. But none of the property has been returned to the Petitioner's, and only partial of the property confiscated can be assessed in monetary terms. Although legal materials, which includes two transcripts, numerous motions, post-conviction petition, and legal correspondence were also apart of the property confiscated, such legal materials could not be assessed,or determined as monetary terms, or in fact be conpensated for such materials through exhaustion of State Administrative remedies.

So Petitioner only alternative was to redress his grievance to the Court for the damages he suffered after the confiscation of his legal materials and other Items, for the legal materials no adequated value could have been determined, especially, when Petitioner materials was not appraise, and other then that he still have litigations pending in the Court.

The property that was confiscated from the Petitioner cell were not listed in the prison property order as contraband property, so he should had been allow to keep all of the property that were confiscated from his cell. The Petitioner also should have been allow to have a list of the property that were confiscated, when the Administrative Rules required that a report

be wrote on all property that be confiscated from a prisoner cell's, one copy of the report to the inmate and a copy for the Administrated file, see exhibit (d) p.6,(L). Petitioner claims that such act as the Respondent's confiscating his property Items and his legal documents, leaves him to believe that the Respondent's did not want him to have access back into the Courts for an appeal process, such action were a violation of Petitioner Fifth and Fourteenth Amendment Rights, see Wolff v. Mc Donnell,418 U.S. 539,94 S.Ct.2963, 41 L.Ed.2d 935, (19___).

In this case,exhaustion of State Administrative remedies would no doubt amounted to be a futile act. Lane v. Maryland, 320 F.2d 179(1963), Wilwording v. Swenson,404 U.S. 249,30 L.Ed. 2d 418, 92 S.Ct.407(1971). Any event that the Petitioner would have went through the remedy procedure, redressing his grievance to the Director of Corrections and the Court of Claims, as the Courts sugested, both would had been inadequate to award the Petitioner a full adequate relief, because partial of the property was not taxable to fix or estimate the value.

II. CERTIORARI SHOULD BE GRANTED TO INSURE THAT THE DISTRICT COURT WILL NOT DISMISS A COMPLAINT WITHOUT HEARING ALL DOCUMENTS THAT HAVE BEEN PRESENT TO BE RULED UPON.

The Petitioner claims that the District Court erred by not ruling on his motion to amend and supplement his complaint, before dismissing it. To declare the reason for such ruling on the said motion, so that Petitioner's may have had an opportunity to correct any deficiencies that might have appeared, or to properly refile the motion for the Court's consideration.

There was no specific reason why the Court failed to make a ruling on Petitioner motion, unless the Court were prejudice toward the Petitioner. Whereas Petitioner was aware that a failure,

in an initial complaint, to set-forth the claim by means of a short and plain statement as required by Rule 8 (a) (2), is not a ground for dismissal of an action with prejudice, since there are procedures available for correcting a vague or prolix complaint, and such correcting if any deficiencies had appeared in the complaint, the motion to amend and supplement would have made it distinct and brief for the Court's interpretation, but the Court failed to Rule on his motion, which showed that the District Court were not fair and impartial when not taken all documents under consideration before making an fair decision.

It is stated clearly in Rule 15, that a party has a right to once amend his pleading as a matter of any course. And Rule 15 (a), states that while the granting of leave to file an amended complaint is within the sound discretion of the Court, leave to do so shall be freely given when justice requires. In these cirumstance, an error, in dismissing the Petitioner's complaint without affording him the privilege of amending under Rule 15. Foman v. Davis,371 U.S.178,182, 83 S.Ct.227, 9 L. Ed.2d 222(1962).

The Courts has constantly made clear in such decisions as Amstrong v. Rushing,352 F.2d 836 (1965), Fötter v. McCall,433 F.2d 1087 (1970), Dodd v. Spokane County,393 F.2d 330 (9th Cir. 1969), Harmon v. Superior Court,307 F.2d 796(1962), that a person who is presently incarcerated in a State prison, and is not entitle as a might of right to appear personally at a hearing in a Civil Right Action. Is however, entitle to have (1) process issued and served,(2) notice of any motion there after made by Respondent or the Court to dismiss the complaint and the grounds thereof, (3) an opportunity to at least submit a written

memorandum in opposition to such motion, (4) in the event of dismissal, a statement of the grounds therefor, and (5) an opportunity to amend the complaint to over come the deficiency unless it clearly appears from the complaint that the deficiency cannot be overcome by amendment.

But in the instant matter the District Court did not follow the proper procedure as outlined in the prior decisions, which such decision that the Court did Ruled on dismissing Petitioner complaint before ruling on his motion, gave him the reason to believe that the law have contrived against him, when the law states that he was supposed has been entitle to amend his complaint for such reason that he deem was necessary to correct the deficiencies that may have appeared in his complaint.

Such action as, dismissing Petitioner complaint, before the Court's has taken all of the available documents under full consideration, was a violation of due process and equal protection of law. Petitioner feels that the Court has abused its discretion by denying him the opportunity to amend his complaint, or hear his motion before reaching an decision to dismiss his complaint, pursuant to Rule 19 (a), where there were parties subject to be served and notified of Petitioner's claims.

A necessary predicate to a cause of action under 42 U.S.C. Section 1983 is that the Respondents act "under color of state law". Shelley v. Kraemer,334 U.S. 1, 63 S.Ct. 836, 92 L. Ed. 1161 (1948). As alleged in Petitioner Amendment and Supplement, (see appendix (F),attached), the Respondents in questioned were proper parties. Respondent Lou Brewer's motion to be dismissed as a proper party was based upon the contention that he was not responsible for the conduct of the officials wording under his directive, besides Respondent Lou Brewer should be held liable for negligence in failing to give the officials adequate traning

and supervision of there conduct, he is legally responsible for the altercation that took place at Stateville, Carter v. Carlson,447 F.2d 358(1971).

Petitioner motion pursuant to Rule 19 (a), should have been heard upon Respondent Lou Brewer's reasoning,Petitioner's claims would have been in jeaopardy for like of jurisdiction. If in fact Petitioner's complaint stated a claim upon which relief could have been granted, but the District Court indeed errored by dismissing his complaint based upon a technicality, Conley v. Gibson,355 U.S. 41,45,46, 78 S.Ct.99,102., 2 L.Ed.2d 80 (1957).

In this case the technicality be the failure to exhaust Administrative remedies, Asher v. Harrington, 461 F.2d 890 (1972).

CONCLUSION

It is therefore respectfully submitted that certiorari be granted to review the judgment of the court of appeals entered in this case.

Dane Lamar Jenkins
Petitioner

Dane Lamar Jenkins #C-72233
P.O. Box 112
Joliet, Illinois 60434

CERTIFICATE OF SERVICE

Pursuant to Rule 33 of the Rule of the Supreme Court of the United States, I hereby certify that on the 11th day of July, 1970, I left a copy of the foregoing Petition for a writ of Certiorari at the Northern District of Illinois, at Room _____, Federal Building, Chicago, Illinois, and by mailing a copy in a duly addressed envelope with air mail postage prepaid, to the Solicitor General, Department of Justice, Washington, D.C. 20530.

Dane Lamar Jenkins

Dane Lamar Jenkins C-72253

Appendix (1)

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Name of Presiding Judge, Honorable Bernard M. Decker

Cause No. 79 C 2138 Date Oct. 25, 1979

Title of Cause DANE LAMAR JENKINS v. LOU BREWER, Warden

Brief Statement of Motion

The rules of this court require counsel to furnish the names of all parties entitled to notice of the entry of an order and the names and addresses of their attorneys. Please do this immediately below (separate lists may be appended).

Names and Addresses of moving counsel

Representing

Names and Addresses of other counsel entitled to notice and names of parties they represent.

DOCKETED

OCT 25 1979

Reserve space below for notations by minute clerk

Memorandum Opinion and Order entered.

Plaintiff's complaint is dismissed for failure to exhaust administrative remedies.

(DRAFT)

Hand this memorandum to the Clerk.
Counsel will not rise to address the Court until motion has been called.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DANE LAMAR JENKINS, Plaintiff,	)	
-vs-	)	NO. 79 C 2188
LOU BREWER, Warden, Defendant.	)	

MEMORANDUM OPINION AND ORDER

Dane Lamar Jenkins, acting pro se, has brought this action under 42 U.S.C. §1983 alleging that certain items of his personal property were taken from him in violation of the due process clause of the United States Constitution. Plaintiff is a prisoner in the Stateville Correctional Center, and his property was allegedly taken by prison officials during a "shake down" at the prison, under a declared state of emergency. Defendants have moved to dismiss for failure to state a claim upon which relief may be granted, or for summary judgment.

Defendants allege in support of their motion that the Department of Corrections should be dismissed as a defendant, that the doctrine of respondeat superior is not applicable to this case, and that plaintiff has failed to exhaust his administrative remedies as required by the Seventh Circuit in Secret v. Brierton, 584 F.2d 823 (7th Cir. 1978). In view of the result reached on this last question, it is unnecessary to decide the first two.

Plaintiff did take his complaint to the prison grievance committee, but after it was denied, he failed to utilize the available appeal to the Director of the Department of Corrections, as provided in the Department of Corrections regulations section 845(H). Plaintiff claims that exhaustion in this case would have been a futile act, citing Houghton v. Shafer, 392 U.S. 639 (1968). However, in that case, an appeal was deemed futile because the appeal would have been to the Attorney General, who had already said the prison rules had been correctly applied in that case. Id. at 640.

Secret, on the other hand, directly controls this case. Exhaustion of administrative remedies is required in "prisoner §1983 cases which allege deprivation without due process of law of tangible items of personal property of no great monetary value." 584 F.2d at 829. Administrative procedures, to be considered adequate:

> "must be capable of providing the remedy sought by the plaintiff. They must be capable of providing that remedy within a reasonable time so as not to delay unduly the plaintiff's right to file his complaint in federal court. Finally, they must not be so inherently unfair that utilization of them would be futile." Id. at 831.

In view of the facts that the appeal procedure at issue here is the very same one expressly approved by the Court of Appeals in Secret, id. at 832, and that petitioner has put forward no reasons why it should be considered "inherently unfair," this court cannot say that such an appeal would have been futile.

Plaintiff's complaint is dismissed for failure to exhaust administrative remedies.

ENTER:

Richard M. Bilby
United States District Judge

DATED: October 24, 1979.

Appendix (B)

Unpublished Per Curiam Order

JUDGMENT - ORAL ARGUMENT

United States Court of Appeals 13

For the Seventh Circuit

Chicago, Illinois 60604

June 20, 1980.

Before

Hon. WILLIAM J. BAUER, Circuit Judge

Hon. JOHN F. KILKENNY, Senior Circuit Judge*

Hon. RICHARD D. CUDAHY, Circuit Judge

DANE LAMAR JENKINS,
Plaintiff-Appellant,

No. 79-2437 vs.

WARDEN LOU BREWER, Department of Corrections,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

No. 79-C-2188
Bernard M. Decker, JUDGE

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, in accordance with the order of the court entered this date.

*The Honorable John F. Kilkenny, Senior Circuit Judge of the Ninth Circuit Court of Appeals, is sitting by designation

FPI—MAR—12-12-78-12M-1151

Appendix (B 1)

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604
(ARGUED MAY 28, 1980)

UNPUBLISHED ORDER
NOT TO BE CITED
PER CIRCUIT RULE 35

June 20, 1980.

Before

Hon. WILLIAM J. BAUER, Circuit Judge

Hon. JOHN F. KILKENNY, Senior Circuit Judge*

Hon. RICHARD D. CUDAHY, Circuit Judge

DANE LAMAR JENKINS,
Plaintiff-Appellant,

No. 79-2437 vs.

WARDEN LOU BREWER, Department of Corrections,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 79 C 2188
Bernard M. Decker, Judge.

ORDER

Plaintiff-appellant Dane Lamar Jenkins appeals an order dismissing his complaint brought under 42 U.S.C. § 1983. Plaintiff alleged that certain property valued at approximately $600 was taken from him without due process of law during a prison "shakedown."

Having examined the record, addressed the briefs, and heard oral argument on behalf of the parties, we agree with the district court that the plaintiff failed to exhaust his administrative remedies as required by Secret v. Brierton, 584 F.2d 823 (7th Cir. 1978). Accordingly, for the reasons stated in Judge Decker's attached Memorandum Opinion and Order of October 24, 1979, which we adopt as the decision of this Court, the judgment of the district court is affirmed.

AFFIRMED.

*The Hon. John F. Kilkenny, Senior Circuit Judge of the Ninth Circuit Court of Appeals, is sitting by designation.

FPI—MAR—12-12-78-12M-1191

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DANE LAMAR JENKINS, Plaintiff, -vs- LOU BREWER, Warden, Defendant.	)	NO. 79 C 2188

MEMORANDUM OPINION AND ORDER

Dane Lamar Jenkins, acting pro se, has brought this action under 42 U.S.C. §1983 alleging that certain items of his personal property were taken from him in violation of the due process clause of the United States Constitution. Plaintiff is a prisoner in the Stateville Correctional Center, and his property was allegedly taken by prison officials during a "shake down" at the prison, under a declared state of emergency. Defendants have moved to dismiss for failure to state a claim upon which relief may be granted, or for summary judgment.

Defendants allege in support of their motion that the Department of Corrections should be dismissed as a defendant, that the doctrine of respondeat superior is not applicable to this case, and that plaintiff has failed to exhaust his administrative remedies as required by the Seventh Circuit in Secret v. Brierton, 584 F.2d 823 (7th Cir. 1978). In view of the result reached on this last question, it is unnecessary to decide the first two.

Plaintiff did take his complaint to the prison grievance committee, but after it was denied, he failed to utilize the available appeal to the Director of the Department of Corrections, as provided in the Department of Corrections regulations section 845(H). Plaintiff claims that exhaustion in this case would have been a futile act, citing Houghton v. Shafer, 392 U.S. 639 (1968). However, in that case, an appeal was deemed futile because the appeal would have been to the Attorney General, who had already said the prison rules had been correctly applied in that case. Id. at 640.

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> "must be capable of providing the remedy sought by the plaintiff. They must be capable of providing that remedy within a reasonable time so as not to delay unduly the plaintiff's right to file his complaint in federal court. Finally, they must not be so inherently unfair that utilization of them would be futile." Id. at 831.

In view of the facts that the appeal procedure at issue here is the very same one expressly approved by the Court of Appeals in Secret, id. at 832, and that petitioner has put forward no reasons why it should be considered "inherently unfair," this court cannot say that such an appeal would have been futile.

Plaintiff's complaint is dismissed for failure to exhaust administrative remedies.

ENTER: Bernard M. Decker
United States District Judge

DATED: October 24, 1979.